Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM,
1977

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NO. 77-975

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OLIVER PAUL SUMMERS,
Petitioner

vs.

STATE OF ALABAMA,
Respondent

* * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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CITATIONS

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, OLIVER PAUL SUMMERS, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 24th of May, 1977, which judgment affirmed the conviction of OLIVER PAUL SUMMERS for the crime of robbery in the Circuit Court of Marshall County, Alabama.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at 348 So2d 1126, cert.den. 348 So2d 1136, and is attached hereto in Appendix A, infra, pp. A1 thru A26 .

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 24th of May, 1977, and is annexed hereto in Appendix A, infra, p.A27 .

A timely petition for rehearing was denied on the 28th of June, 1977, and the judgment of the Court of Criminal Appeals of Alabama thereon is in Appendix A, infra, p. A27 .

A petition for writ of certiorari timely filed in the Supreme Court of Alabama was denied on the 26th of August, 1977, and the order thereon is in Appendix A, infra, p.A28 .

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 24th of May, 1977, is 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether or not Alabama denied to petitioner SUMMERS the right to compulsory process for compelling the attendance of two witnesses by means of depositions, such right being guaranteed by the Sixth Amendment, Constitution of the United States, as the same is made applicable to the State

of Alabama by operation of the Fourteenth Amendment, Constitution of the United States, where Alabama denied a continuance within one month after arraignment so as to permit the completion of the interrogatory process which had been initiated by petitioner SUMMERS.

II.

A subsidiary, and necessarily included question, is whether or not Alabama denied petitioner SUMMERS that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, by the refusal of a requested continuance predicated upon the completion of the interrogatory process of two witnesses, which continuance was denied in the time period of the one month, approximately, which elapsed between arraignment and trial.

III.

Whether or not an appellate court denies to an appellant that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, where it relies in its affirmance upon facts which have been ruled out by the trial court, and where no other facts in the record support the conclusion of the appellate court for its affirmance.

IV.

Whether or not petitioner SUMMERS was denied that due process of law guaranteed by the Fourteenth Amendment, Constitution of the United States, where the prosecutor was permitted in argument at closing to refer to petitioner SUMMERS as a "safe specialist", which statement was not predicated upon evidence of prior crimes of that nature.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I.

Constitution of the United States, Amendment VI:

> In all criminal proceedings, the accused shall enjoy the right *** to have compulsory process for obtaining witnesses in his favor,***

II.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law; ***

III.

Title 28, Section 1257(3), United States Code:

> Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

***

> (3) By writ of certiorari, *** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, *** the United States.

STATEMENT OF THE CASE

Petitioner SUMMERS was proceeded against by the State of Alabama in the Circuit Court of Marshall County, Alabama, for the criminal offense of robbery, such robbery having occurred allegedly on the 20th of August, 1975.

The salient and pertinent facts to support the indictment produced on the trial of this cause are delineated in the opinion of the Court of Criminal Appeals, and, in the interest of conserving time and space, shall not be repeated at this point. However, certain matters which were not admitted into evidence at the trial level shall be set forth later.

Of particular import here, however, and especially in connection with Questions I and II for which review is sought, the proceedings concerning the two witnesses which petitioner SUMMERS attempted to depose by interrogatories under the provisions of applicable Alabama law must be presented at greater length.

After arraignment and within the one month prior to commencement of trial, petitioner SUMMERS commenced proceedings to obtain the testimony of two witnesses who were incarcerated in two different places of confinement. This procedure in Alabama envisions written interrogatories, and is, of necessity, time-consuming.

Because this procedure could not be completed prior to the commencement of the trial, the attorneys for petitioner SUMMERS moved for a continuance to permit these interrogatories to be answered, which motion was DENIED. Thus, these questions were presented at the first opportunity, and were decided adversely to petitioner SUMMERS. Also, on appeal, the Court of Criminal Appeals of Alabama held the trial court did not abuse its discretion in denying the requested continuance because "there was absolutely no showing what the testimony of these witnesses would be."

During the closing arguments, the prosecuting attorney for the State of Alabama commented with reference to petitioner SUMMERS' having threatened a State witness. At the trial, this was objected to as being prejudicial and inflammatory, and the trial court instructed the jury to disregard the remark in reaching its decision. However, the appellate court in its opinion of affirmance held the statement was fully supported by the evidence. Of course, this remark was not allowed to go to the jury, but the question remained as to whether or not a

mistrial should have been in order. Thus, the Court of Criminal Appeals of Alabama used in its opinion statements which were not before the jury, and denied to petitioner SUMMERS a proper review of his contentions about prejudice leading to a new trial.

Petitioner SUMMERS during the course of the trial objected to the admission into evidence of certain testimony that he was ready to open safes. The trial court sustained the objection to these conclusions, but on affirmance the appellate court specifically stated that this was the purpose of the alleged attendance by petitioner SUMMERS on the date of the robbery. It further used this statement to reach the conclusion that denominating petitioner SUMMERS a "safe specialist" by the prosecuting attorney in closing argument was a legitimate inference from the evidence. Hence, there was no prejudicial argument to the jury, the court concluded.

The foregoing matters were raised at the first opportunity in the trial court, or were generated by the Court of Criminal Appeals in its opinion. The issues raised at trial level were briefed on appeal; and the matters adjudicated adversely to petitioner SUMMERS.

There are properly presented federal constitutional questions and issue before this Court.

REASONS FOR GRANTING THE WRIT

A. The denial of a continuance to permit a defendant in a criminal case to complete the established procedures for obtaining testimony by interrogatories on depositions is a denial of due process and the right to have compulsory process for obtaining witnesses.

The right of a defendant in a criminal case under the Sixth Amendment to have compulsory process for obtaining witnesses in his favor is made applicable to the States through the Fourteenth Amendment, since the right is so fundamental, and essential to a fair trial. Washington v. Texas, 388 US 14 (1967).

The case on the immediate question of a continuance where out-of-state witnesses were involved that still is law apparently is Minder v. Georgia, 183 US 559(1902). This Court held there was not a denial of due process because it was not within the power of a state to compel the attendance of witnesses beyond the limits of the state. This Court further stated that due process was not denied because there was no provision in state law for out-of-state depositions.

However, Alabama law does provide that a defendant may take a deposition of a witness who is out-of-state, OR, as in this case, a witness who is in prison. Both of the witnesses here were in pri-

son, either in Alabama or in Florida. In this case, petitioner SUMMERS properly commenced the procedures outlined in the Alabama statute, but within a one month period could not complete these procedures, although such procedures were not being used for delay by petitioner SUMMERS.

Then, a continuance was requested in order to allow the completion of the procedures, and the trial court denied the motion, and petitioner SUMMERS was put to trial within one month of arraignment and without any assistance which may have accrued to him by having the testimony of these witnesses. The point becomes crucial when it is realized that petitioner SUMMERS was not alleged to have been present at the scene of the robbery, and that the testimony of an admitted robber was used by the State of Alabama to prove the involvement of petitioner SUMMERS.

Petitioner SUMMERS is aware of Lisenba v. California, 319 US 219(1941), wherein this Court ruled that a continuance was not required to meet Fourteenth Amendment due process requirements merely to answer the contentions of the prosecution, and that this Court would not inquire into whether the California court abused its discretion in so denying a continuance.

However, that case was decided before Washington, as was Minder, and, hence,

Sixth Amendment considerations were not involved.

In the posture of this case, petitioner SUMMERS properly commenced the utilization of statutory procedures to obtain testimony of witnesses who were in prison or otherwise confined. However, the inherent time factor involved in the utilization of these statutory procedures made them of no value to petitioner SUMMERS since they could not be completed prior to the trial date. A continuance for this purpose was denied, and the denial was upheld by the Court of Criminal Appeals of Alabama.

A matter near of kin to the present one was decided by the Court of Criminal Appeals in Sparks v. State, 46 Ala.App. 357, 242 So2d 403, adverse to a criminal defendant, and this Court denied certiorari when the question was presented, October Term, 1970, No. 1462. These are, therefore, recurring problems in the administration of criminal justice by the States, and this question shall remain troublesome until decided by this Court.

B. An appellate court by relying upon excluded matter in the trial court for an affirmance denies to an appellant in a criminal case due process of law.

Petitioner SUMMERS had protected himself and the record in this case by ob-

jecting to certain matters in the argument of the prosecuting attorney for the State of Alabama. These objections were sustained, and tne trial court admonished the jury to exclude the remarks, and in the case of evidence, the evidence, from their consideration in determining guilt or innocence.

Notwithstanding this record, the Court of Criminal Appeals of Alabama, in the instances noted above, used the excluded evidence to sustain the non-prejudicial nature of argument by the prosecuting attorney.

This proposition concerning that use by the Court of Criminal Appeals of Alabama appears to be novel, and no case has been located which speaks to the proposition.

However, it would appear to be sound reasoning that an appellate court can violate the due process standards as well as a lower court, or trial court.

The statements of the prosecuting attorney would be improper argument leading to and compelling a reversal if such statements were not fair comment on the evidence. Hence, such statements are not with any basis when, as here, such statements are found by the appellate court to be predicated upon evidence which had been excluded from consideration by the jury. Thus, the appellate court has premised its affirmance upon a completely

erroneous basis, and thereby deprived petitioner SUMMERS of that due process guaranteed to him by the Fourteenth Amendment, Constitution of the United States. It will be noted that the prosecuting attorney for the State of Alabama was well aware that the basis for his argument had been ruled out by the trial court. This leads to the conclusion there was a deliberate action on the part of the State of Alabama to procure a conviction notwithstanding any right or rights of petitioner SUMMERS.

The impact of such comments reached a peak when the prosecuting attorney denominated petitioner SUMMERS a "safe specialist" in closing oral argument, and, as we have shown, there was no basis in fact for this argument.

Prosecutorial comment may give rise to a federal constitutional question in the context of that fair trial which is part and parcel of the Fourteenth Amendment, Constitution of the United States. See Donnelly vs. DeChristofore, 416 US 637. See also Hall v. United States, 419 F2d 582 (5th Cir.1969), wherein this question is discussed in detail.

Petitioner SUMMERS submits that the characterization in the present case, approved by the Court of Criminal Appeals of Alabama, went beyond any permissible fair comment in violation of his Fourteenth Amendment rights.

A general question is not presented here; the specific question is whether characterizations presented without underlying evidence can stand federal constitutional muster. This Court is not asked to go into the thicket of the many, many factual situations involving what is or is not fair comment when there is evidence before the jury.

CONCLUSION

Petitioner SUMMERS submits the petition for writ of certiorari to the Court of Criminal Appeals of Alabama is due to be granted so that the questions may be fully briefed and argued.

JANUARY, 1978

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APPENDIX

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1976-77
8 Div. 943 MAY 24, 1977

Oliver Paul Summers, alias
v.
State

Appeal from Marshall Circuit Court

HARRIS, JUDGE

Appellant was convicted of robbery and the jury fixed his punishment at 15 years in the penitentiary. He was arraigned in the presence of his retained counsel and interposed a plea of not guilty. After conviction and sentence appellant gave notice of appeal.

Omitting the formal parts the indictment reads as follows:

> "The Grand Jury of said County charge that before the finding of this indictment Oliver Paul Summers, alias Paul Summers,alias Frank Summers, whose name to the Grand Jury is otherwise unknown, feloniously took, to-wit: Five Thousand Five Hundred Fifty Nine Dollars in lawful paper currency of the United States of America, the exact denominations of the bills being unknown to the Grand Jury, the property of Marjorie Cherry, from Joseph Cherry and

"Marjorie Cherry, against their will, by violence to their persons, or by putting them in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama."

This case was tried on the evidence adduced by the State. Appellant did not testify nor did he offer any evidence in his behalf. When the State rested, appellant made a motion to exclude the State's evidence on the ground the State's case was based upon the uncorroborated testimony of accomplices. This motion was overruled and denied.

Mrs. Marjorie Cherry testified that she and her busband lived on the Kilpatrick Highway in Boaz, Alabama, and that she and her husband owned and operated the Sand Mountain Auto Auction located on Highway 431 near Boaz, Marshall County, Alabama. She stated they conducted an automobile auction every Wednesday and at times took in large sums of money. They had an auction on Wednesday, August 20, 1975, and she carried the proceeds from the auction sales to her home and hid the money in a clothes hamper in the bathroom and was going to make a bank deposit the next day.

Mrs. Cherry further testified that she and her husband were in their home on the evening of August 20, 1975. She stated at approximately 7:30 p.m. she was in the kitchen and heard the doorbell ring. Her husband went to the door and she heard him

say, "I'll get my wife." A few minutes later her husband walked in the kitchen followed by a man holding a pistol in his hand. The man with the pistol said, "This is a holdup. I am a professional; I'm not working alone. If you do exactly as I say, you'll not be hurt."

The man with the gun ordered Mr. and Mrs. Cherry to go into the bedroom and lie face down on the bed. Mrs. Cherry protested that she recently had surgery and could not lie face down and the man said, "That's alright, Mrs. Cherry, lie on your back." The man with the pistol ordered Mr. Cherry to lie face down on the bed and he told the man that he had a heart condition and the man told him to lie on his side. The man placed a pillow over Mrs. Cherry's face and a small rug over Mr. Cherry's face. He then taped their hands and ankles together.

Mrs. Cherry further stated that besides the man with the gun another man also entered the house and while the man with the gun stood guard over them, she heard the other robber going through the house opening doors and drawers. The robber with the gun kept asking, "Where is the safe?" Mrs. Cherry told him there was no safe in the house. The man then asked about their coin collection and Mrs. Cherry told him it was in the bank. The robbers found two shoe boxes full of coins in one of the closets and took them.

The robbers asked Mrs. Cherry where

the money was and she told them she did not bring the money home that day but had given it to her brother to deposit. The man with the gun told her he did not believe that she had given the money to her brother to deposit and that the money was somewhere in the house. The bandit with the gun told Mr. Cherry, "If you don't make her tell me where the money is, I'm going to have to start working on you." Mr. Cherry told his wife to please tell the men where the money was and she told the robbers that the money was in the bathroom in the clothes hamper. This money was the proceeds from the auction sale that day and the amount of it was $5,559.00.

The bandits then took Mr. Cherry's billfold and watch and they removed all the jewelry Mrs. Cherry was wearing. They also took a jewelry case containing watches, diamond rings, diamond pins, wedding band and other items of jewelry. The bandits were in the Cherry home a total of about 45 minutes and as they were leaving they took the keys to both automobiles but drove away in only one of the cars.

Mrs. Cherry further testified that she had a burglar alar, system installed in her house. She tried to activate the alarm system when she first saw the bandit with the pistol, but the system had been turned off earlier when Mr. Cherry had gone to the back porch. Mr. Cherry stated that in April, 1974, the telephone lines leading to the house had been cut,

setting off the burglar alarm and at that time no burglary was committed.

Mrs. Cherry identified an envelope, marked State's Exhibit 1, containing seven items of jewelry as being part of the jewelry the bandits took the night of the robbery at the same time they took the money aggregating $5,559.00. State's Exhibit 1 was admitted into evidence without objection. Mrs. Cherry specifically identified this jewelry as a yellow-gold pin with rhinestones and matching gold earrings, spiral earrings with pearls, a wedding band with a quarter carat solitaire and an engagement ring.

Donald Nissen testified that he had previously entered a plea of guilty to the robbery of Mr. and Mrs. Cherry and had received a sentence of 15 years.

Nissen testified that the robbery had been planned at the home of the defendant Paul Summers in Clanton, Alabama. Nissen testified that present at the time were Danny McClellan, Danny Register and Bull Poe. Nissen testified that Danny McClellan is presently doing a natural life sentence in the Florida State Penitentiary. He testified that Bull Poe is currently serving two life sentences in Alabama. And he said that Danny Register is currently in jail waiting to go to the penitentiary. Nissen testifed that the discussion concerning robbing the Cherrys took place approximately six weeks to two months before the robbery occurred.

At this meeting at Summers's house, Summers told the group that he had been up to the Cherrys' house in Marshall County and "looked at it with the intention of burglarizing the house to rob a safe with someone else." Summers said that due to the fact there was a burglar alarm on the house they were not able to enter the house and that he wanted the group to go up there and look at the house with him with the thought of robbing Mrs. Cherry at gunpoint. Summers said that there would be no one there but Mrs. Cherry herself.

A few days after this meeting Nissen, Poe, Register, McClellan and the defendant Summers drove to Boaz to rob Mrs. Cherry. When they arrived they found that Mrs. Cherry had remarried and, because they were uncertain as to who her new husband was, and how many people might now be living in the house, plans to rob the house and its inhabitants were postponed.

Nissen testified that some five or six weeks later in August of 1975 a group consisting of himself, Danny McClellan, Bull Poe, Paul Summers, Jimmy Thomas and Rusty Zinghan left for Boaz from the defendant's car lot in Clanton early in the morning. McClellan, Poe and Summers were traveling in Summers's Lincoln Continental. Zinghan, Thomas and Nissen were traveling in a black 1965 Oldsmobile which they got from the defendant Summers's car lot in Clanton.

On the way to Boaz they stopped just south of Birmingham in the town of Hoover and robbed a family in that community around midmorning. Following this robbery the group traveled to Boaz and arrived there approximately two hours before dusk.

The group assembled in the Holiday Inn parking lot in Boaz and traveled in one car to the Cherrys' house. The house was pointed out to the group by the defendant Summers. They all then returned to the Holiday Inn. At that time Zinghan, Thomas and Nissen got in the black 1965 Oldsmobile and drove around waiting for nightfall. McClellan, Poe and Summers waited behind for them at the Holiday Inn in Summers's Lincoln Continental.

After nightfall Nissen, Zinghan and Thomas drove to the Cherry residence and Nissen and Thomas went to the front door. Zinghan waited in the car. After gaining entrance to the house on the ruse that they had some cars to sell, Nissen and Thomas proceeded to tie up and rob Mr. and Mrs. Cherry.

After entering the house Nissen returned to the front door and notified Zinghan, who was waiting outside in the car, to leave. Following the robbery Nissen and Thomas left in one of the Cherrys' cars. They drove to the Holiday Inn parking lot where they met McClellan, Poe and the defendant Summers.

Nissen had a suitcase he had taken

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from the Cherrys' house in which he had placed the guns used in the robbery and the money and jewelry obtained during the robbery he put in an attache case. Nissen gave this suitcase and the other case to Paul Summers. Summers took both cases and threw them in the back of his Lincoln Continental. After hiding the Cherrys' Oldsmobile in a field, Nissen, Zinghan, Thomas and Poe met with McClellan and the defendant Summers at a truck stop. At that time McClellan counted out $500 each from the proceeds of the robbery to Thomas and Zinghan. Following this, Poe and Nissen took Zinghan and Thomas to Birmingham where Zinghan and Thomas boarded a plane to Tampa, Florida.

After dropping off Zinghan and Thomas at the airport in Birmingham, Nissen and Poe drove to Clanton where they met Summers and McClellan at Summers's car lot. There they parked the 1965 black Oldsmobile that they had used in the robbery back in the car lot and removed the license plates that had been used in the robbery from it.

The four, Nissen, Poe, McClellan and Summers then went inside the office of the car lot and divided up the money and jewelry that had been taken in the robbery. Nissen testified that Summers's share of the money taken in the robbery was approximately eight or nine hundred dollars. All of the silver coins taken from the robbery were left at the office of Summers's car lot. Summers was supposed to take the silver coins and "turn

them into cash." Part of the jewelry was taken by Danny McClellan and the rest was left in Clanton with the defendant. Nissen got a Longine watch for part of his share of the jewelry.

Nissen then identified several items of jewelry that had been taken in the robbery and previously identified by Mrs. Cherry.

Nissen testified that the defendant Summers had provided the license plates which were placed on the automobiles used in the robbery.

On cross-examination Nissen testified that he had also pled guilty to two second degree burglary charges in Houston County, Alabama and received a 15 year sentence, concurrent with the 15 years he received in the Cherry robbery. Nissen testified that he had an agreement with the State of Alabama whereby he was to receive a total of 15 years imprisonment for the commission of some six robberies and two burglaries.

On redirect Nissen testified that Summers came along on the trip to Boaz "in case we had to open a safe, to open the safe for us at the first place that we had robbed that day," (the robbery that had occurred in Hoover earlier on the same day as the Cherry robbery). Summers had brought along safe cracking tools on the trip.

Elaine McClellan testified that her husband, Danny McClellan, is presently serving a life sentence in the State of Florida.

Mrs. McClellan identified several items of jewelry that had been previously identified as coming from the Cherry robbery. She testified that she first saw the items of jewelry at the defendant Summers's car lot in Clanton in late August or early Septembed of 1975. She testified that she and her husband Danny McClellan had driven up to the defendant's car lot from their home in Dothan.

When they arrived at the car lot they were met by the defendant Paul Summers. The three of them went into the office at Paul Summers's car lot. Upon entering the office her husband, Danny and the defendant Summers went into a side office. Shortly afterward they returned. As they returned she saw the defendant Summers handing to her husband a small white box. At the time she saw Summers hand the box to her husband she heard Summers say, "This is the rest of the jewelry from the score off the mountain." She also heard Summers say that the jewelry came from the lady who owned the auction in Boaz.

Later, on the way back to Dothan in the car she looked into the box and saw the items of jewelry which she had previously identified and two wristwatches- a man's and a woman's. The man's wristwatch was given by her husband to her younger brother and the woman's wristwatch was

pawned in a pawnshop in Tampa, Florida. The rest of the jewelry remained at her house until the investigation into this case began and was turned over to Lieutenant Stokes of the Dothan Police Department.

Mrs. McClellan also testified that during the time she and her husband were at the defendant's car lot in Clanton she heard Summers complaining to her husband "that Don(Nissen)had held out some things off the mountain." Summers also said at the time that it wasn't the first time that Nissen had "held out some things from a score that I had set up."

Mrs. McClellan also testified that Summers was complaining at the time to her husband about Don(Nissen) and Jimmy (Thomas) having screwed up a job in Columbiana the same day.

The witness also testifed that a few months preceding the trial she received a telephone call from the defendant Summers at her residence in Dothan. During the conversation the defendant asked her if she had "heard about Wormy (Donald Nissen) being picked up in the blue Mark IV" in Florida. Summers also said that he Summers, had heard that "Don (Nissen) and Danny (McClellan) had gotten together and talked to the big men." Mrs. McClellan testified that Summers also told her that if Bull (Poe) had done the job right that he would "not be where he is at today." Summers also said that he was having to send money to

Poe to keep his mouth shut.

Mrs. McClellan also testified that just a few pweeks prior to the trial she received another telephone call from the defendant Summers at her home in Dothan. During the conversation Summers asked her if she was going to be a State's witness in the case against him. She testified that he said, "I don't hurt women or anything, but are you a State's witness?"

On cross-examination Elaine McClellan testified that she had worn some of the stolen jewelry she had previously identified prior to turning it over to the Dothan Police Department. She stated that she turned the jewelry over to Lieutenant Stokes of the Dothan Police Department when she learned that Donald Nissen had been arrested. She testified that no case was currently pending against her for buying, receiving or concealing stolen property. She testified that she did not have a felony record.

Mrs. McClellan testified that the life sentence her husband Danny McClellan was serving in Florida was a natural life sentence for a murder committed during the course of a robbery. She stated that McClellan would not be eligible for parole for 25 years.

Following the testimony of Elaine Campbell McClellan it was tipulated by the attorneys for the State and for the defense that the case had been brought in the proper venue.

Appellant contends that the indictment in this case is void and would not support the judgment of conviction. We do not agree.

This Court has held many times that there are three essential elements of the crime of robbery. They are: (1) felonious intent, (2) force, or putting in fear as a means of effecting the intent, and (3) by that means taking and carrying away of the property of another from his person or in his presence, all of these elements concurring in point of time. Tarver v. State, 53 Ala.App.661, 303 So2d 161; Crutcher v. State, 55 Ala.App.469, 316 So2d 716.

The constitutional right of an accused to demand the nature and cause of the accusation against him is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense.

An indictment should be specific in its averments in four prime aspects to insure this guaranty: (a) to identify the accusation lest the accused should be tried for an offense different from that inetended by the grand jury; (b) to enable the defendant to prepare for his defense; (c) that the judgment may inure to his subsequent protection and foreclose the possibility of being twice put in jeopardy for the same offense, and (d) to enable the Court, after conviction,

to pronounce judgment from the record.

The indictment in this case practically tracks the form prescribed by the statute for the offense of robbery. Title 15, Section 259, form 95, Code of Alabama 1940.

Appellant claims that the indictment does not sufficiently charge the offense of robbery because it does not contain the formal wording "from the person of or in the presence of" in referring to the taking of the property from the victims.

In Hardis v. State, 28 Ala.App.524, 189 So.216, was held good an indictment charging the defendant with "having feloniously taken one automobile truck of the value of $500, and meal of the value of $10, all of the aggregate value of $510, the property of I.N. Stewart, from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same." It will be noted that the words "in the presence of" were omitted from the indictment in Hardis, supra.

Title 15, Section 232, Code of Alabama 1940 provides,in pertinent part, that an "indictment must state facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to promounce the proper judgment;. ."

The indictment in this case is couched in language so clear that any person of common understanding would know that the crime of robbery was charged against appellant.

Cases in other jurisdictions which have considered this same issue clearly hold that the words "from the person of or in the presence of" are not necessary in an indictment for robbery as long as it can be reasonably inferred that the property in question was taken from the person of, or under the control of, the victim of the robbery. See Salzer v. Maxwell, 173 Ohio St.573, 184 N.E.2d 396; People v. Franklin, 22 Ill.App.3d 775, 317 N.E.2d 611; State v. Oliver, 32 Ohio St.2d 109, 290 N.E.2d 828; People v. Williams, 403 Ill. 248, 85 N.E.2d 828; Smyth v. White, 195 Va. 169, 77 S.E.2d 454.

In Salzer v. Maxwell, supra, the appellant complained that the indictment did not contain the words "from the person of" and contended the omission of those words rendered the indictment defective in not alleging an essentail element of the crime.

The Ohio Supreme Court specifically upheld the indictment saying:

> "All of the provisions of the statute were contained therein except the phrase, 'from the person of' and, when the allegation, 'did steal' from Chester Schubert, is read in conjunction with the

"remainder of the indictment, it is clear that the currency was taken from the person of, or that the currency was under his immediate control at the time of the theft."

Appellant appeared along with his retained counsel at his arraignment approximately one month prior to the date of his trial. At his arraignment appellant received, read and signed a printed copy of his legal rights in the presence of his attorney. This document informed appellant that he was charged with the offense of robbery, and explained the minimum and maximum sentences to him and his legal rights. There was a colloquy between the Court and appellant during the arraignment proceedings in which appellant informed the Court that he had read and understood his legal rights contained in the printed document and that it was notnecessary for the Court to explain his rights in more detail. At appellant's arraignment the Court expressly told appellant, "The Grand Jury of this County has returned an indictment against you; that indictment charges you with robbery." The indictment was read to appellant in the presence of his attorney and a not guilty plea was entered at that time.

Although appellant was given more than two weeks after his arraignment to file any pleas or motions, no demurrer to the indictment or any motions challenging the sufficiency of the indictment were ever filed by appellant. At the time appellant made a motion to exclude the State's evi-

dence he did not question the sufficiency of the indictment in any form or fashion. The sufficiency of the indictment was raised for the first time on appeal.

We hold the indictment is sufficient to support the judgment of conviction.

Appellant contends that the trial court committed reversible error in denying his motion to exclude the State's evidence. The basis of this motion was that Mrs. McClellan was an accomplice in the robbery and there was no legal evidence to corroborate the testimony of Donald Nissen who was an admitted accomplice. The trial court charged the jury that Nissen was an accomplice as a matter of law and that the jury could not convict appellant on the uncorroborated testimony of Nissen. The Court further charged the jury that after considering all of the evidence in this case, "you determine that Elaine Campbell McClellan, that particular witness, was also an accomplice then you cannot convict the defendant in this case."

The testimony of Mrs. McClellan shows beyond any question that she was not an accomplice in the robbery of Mr. and Mrs. Cherry. She testified that she had seen appellant in his office hand a small white box to her common-law husband, Danny McClellan, and heard him state to her husband,"this is the rest of the jewelry from the score off the mountain." After leaving appellant's place with her husband she opened the box and found jewelry in it. She wore the jewelry for six

to nine months, knowing it was stolen, but without ever knowing from whom it had been stolen. She heard appellant say that the jewelry came from the lady who owned the auction in Boaz, but she did not know the name of the lady. It is clear that Mrs. McClellan had no prior knowledge of the robbery of Mr. and Mrs. Cherry and had no knowledge where the stolen jewelry had come from other than hearing what appellant told her husband at the time appellant gave the box to her husband.

The following cases demonstrate that Mrs. McClellan was not an accomplice in the robbery of Mr. and Mrs. Cherry: Childs v. State, 43 Ala.App. 529, 194 So.2d 861; Dye v. State,25 Ala.App. 138, 142 So.111; Belser v. State, 16 Ala.App.504, 79 So.265.

The testimony of Mrs. McClellan was more than ample and sufficient legal corroboration of the testimony of Donald Nissen, an admitted accomplice.

Next appellant contends that the trial court committed reversible error in allowing testimony concerning the robbery in the Hoover-Columbiana area on the same day and date and by the same parties who robber the Cherrys at Boaz, Alabama.

In Jackson v. State,229 Ala.48, 155 So.581, the Supreme Court held:

"Evidence of other and distinct criminal offense, at other times and places, is admitted in evidence only in exceptional cases and for limited purposes. Among these are cases where such evidence may throw light on the motive, intent, scienter, or identity, and so tend to establish the guilt of the party of the offense for which he is being tried. The details of such other crimes are not admissible, except in so far as essential to disclose the motive or other matter for which it is admitted. Gassenheimer v. State,52 Ala.313; Ingram v. State, 39 Ala.247, 84 Am.Dec.782; Moore v. State,10 Ala.App.179, 64 So.520; Davis v. State, 213 Ala.541, 105 So.677.

"But this case is governed by another and different principle. Everything constituting the one continuous transaction is admissible as of the res gestae. No matter how many distinct crimes may be involved, all the details of the one continuous criminal occurrence or adventure may be considered by the jury in passing upon the culpability, the wickedness, and depravity of the crime for which the party is being tried. In cases of robbery the jury is given a wide range of discretion in fixing the punishment. They may look to all the circumstances

"constituting part of the res gestae in meting out punishment within the limits prescribed by law. It follows all these circumstances are the subject of legitimate argument on the part of the solicitor. Ingram v. State, supra; Kennedy v. State, 182 Ala.10, 62 So.49; Smith v. State,88 Ala.73, 7 So.52; 16 C.J. Section 1115."

The case of Lowe v. State, 134 Ala. 154, 32 So.273, dealt with the prosecution for larceny of 18 head of cattle from a farm in Macon County. While the defendants were driving away with the 18 head of cattle they stopped and picked up a bull that belonged to another person and carried the cattle and the bull to Montgomery. The Supreme Court held that everything that happened on the drive from the first farm to the second farm and then on to Montgomery was part of the same transaction and admissible against the defendants.

In Parsons v. State, 251 Ala.467, 38 So.2d 209, the defendant was tried for robbing a man at his home, of a set of keys. The State was permitted to prove, over objections, that the automobile to which the keys belonged was then used by the thief in committing a burglary. The Supreme Court said:

"But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given

"as part of the res gestae of the offense with which the defendant is charged."

Numerous cases to the same effect are collected in Ala.Dig.Crim.Law, Key No. 365(1).

We hold that evidence of the robbery in the Hoover-Columbiana area which was committed by the same parties and on the same day and date as the robbery of Mr. and Mrs. Cherry at Boaz was properly admissible as of the res gestae and constituted one continuous criminal occurrence or adventure.

Finally appellant contends that the prosecuting attorneys committed reversible error during their closing arguments to the jury wherein the prosecutors referred to appellant as (1) a "safe specialist"; (2) asked the jury to "put the defendant out of circulation for a substantial time to make sure that he will have reached the age of maturity by the time he walks the streets again, and that he will be mature enough not to go back on the job of setting up robberies all over the state"; and (3) because the prosecuting attorney charged the defendant with threatening a witness for the state.

It is settled law that counsel both for the State and the defendant are allowed wide latitude in drawing deductions from the evidence in argument to the jury. Johnson v. State, Ala.Cr.App.,

335 So.2d 663; Colston v. State, Ala.Cr.App.,326 So.2d 520; Edson v. State, 53 Ala.App.460, 301 So.2d 226.

In Edson v. State, supra,this Court said:

> "Every fact the testimony tends to prove, every inference counsel may think arises out of the testimony, the credibility of the witnesses, as shown by their manner, the reasonableness of their story, their inetlligence, menas of knowledge, and many other considerations, are legitimate subjects of criticism and discussion. So, the conduct of the accused, his conversation (if in evidence), may be made the predicate of inferences, favorable or unfavorable."

In Johnson v. State, supra, it was recognized that "comments, even though hard hitting, which may arise from reasonable inferences from the evidence are permissible."

In Colston v. State, supra, this Court held:

> "There is no legal standard by which the prejudicial qualities of improper remarks of a District Attorney in the trial of a case can be gauged. Each case must be determined on its own merits."

In Edson v. State, supra,we further observed:

> "It is both the duty and right of counsel to present the case of his client, whether it be the State or a defendant,as fully and forcibly as the evidence, its tendencies and the inferences therefrom may justify. Within these limits, the widest range of discussion should be accorded."
>
> "The rule in this State is well established and has been often cited. It is as follows: 'The statement must be made as a fact; the fact stated must be unsupported by any evidence, must be pertinent to the issue or its natural tendence must be to influence the finding of the jury . ."(Emphasis in the original).

The evidence adduced was crystal clear that on the day in question, the appellant and five associates left from appellant's car lot in Clanton, Alabama, for the express purpose of committing two robberies that same day-one in the Hoover-Columbiana area south of Birmingham and the other at Boaz, Alabama, at the home of Mr. and Mrs. Joseph Cherry. The evidence showed that in addition to providing the information conerning the places to be robbed the appellant furnished the vehicles with false license plates to be used as transportation to the designated places. Appellant went along with a set of burglary tools or safe cracking tools, to open

safes in the event his services were needed or required.

In the light of this evidence reference to appellant as a "safe specialist" was a legitimate inference to be drawn by the prosecuting attorney in his argument to the jury.

For analogous authorities see the cases of Jeter v. State, Ala.Cr.App.,339 So.2d 91, a worthless check case where a prosecutor referred to the defendant as a "flim flam artist", and Matthews v. State, 42 Ala.App.406, 166 So.2d 883, a stolen property case where the prosecutor referred to the defendant as a "fence". This Court held that the argument of the prosecutor in both of these cases "falls in the scope of proper argument as being a reasonable inference from the evidence as presented."

With reference to the argument of the prosecuting attorney in requesting the jury to put appellant out of circulation for a substantial time to keep him from setting up robberies all over this State we think this argument was no more than an appeal to the jury to convict appellant and, thus, protect society from the commission of similar crimes. Witt v. State, 27 Ala.App.409, 174 So.794; Hawes v. State, 48 Ala.App.565, 266 So.2d 652; Barnett v. State, 52 Ala.App. 260, 291 So.2d 353.

It can be fairly said that the testimony showed that appellant "set up",

conceived, planned and participated in the robbery of the Cherrys' home in Boaz. Added to this is the testimony of Mrs. McClellan that appellant said that it "wasn't the first time that Nissen held out some things from a score that I had set up."

The argument with reference to appellant threatening a State witness is fully supported by the record. Mrs. McClellan testified that appellant called her on the telephone and stated, "I don't hurt women or anything, but are you a State's witness?" The clear implication of this testimony was a warning to Mrs. McClellan that she would be in danger if she showed up at appellant's trial and testified against him. This was a proper subject of comment by the prosecutor.

Appellant filed interrogatories to two witnesses who were either in jail in Alabama or in prison in Florida. These interrogatories were filed the day before appellant moved for a continuance so that these witnesses would have time to answer these interrogatories. There was absolutely no showing what the testimony of these witnesses would be. The trial court did not abuse his discretion in denying appellant's request for a continuance under the circumstances of this case. Brown v. State, 247 Ala.288, 24 So.2d223; Sparks v. State, 46 Ala.App. 357, 242 So.2d 403.

We have carefully searched the record for errors injuriously affecting the

substantial rights of appellant and have found none.

The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

8th Div. 943

Oliver Paul Summers, alias
v.
State
Marshall Circuit Court No. 76-250A

May 24, 1977

Come the parties by attorneys, and the record and matters therein assigned for erros(sic), being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

June 28, 1977

It is ordered that the application for rehearing be and the same is hereby overruled.

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the above judgment and order on application for rehearing are true, full and correct copies of the same as they appear and remain of record and on file in this office.

WITNESS, Mollie Jordan,
Clerk of the Court of
Criminal Appeals, this
20th day of December, 1977.
s/ Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
IN THE SUPREME COURT
OF ALABAMA

AUGUST 26, 1977

SC 2691

EX PARTE: OLIVER PAUL SUMMERS
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(RE: OLIVER PAUL SUMMERS V. STATE OF
ALABAMA)

The Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted to this Court, IT IS CONSIDERED AND ORDERED that the petition be denied at the costs of the petitioner, for which costs let execution issue.

TORBERT,C.J., MADDOX, FAULKNER, SHORES & BEATTY, JJ., CONCUR

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-975

OLIVER PAUL SUMMERS

Petitioner,

VS

THE STATE OF ALABAMA

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIAM J. BAXLEY
Attorney General of Alabama

GEORGE W. ROYER, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

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Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The conviction of Petitioner and his sentence of fifteen years imprisonment in the penitentiary of Alabama for the crime of robbery was affirmed by the Alabama Court of Criminal Appeals in *Summers v. State*, 348 So. 2d 1126 (Ala. Crim. App. 1977).

A Petition for Writ of Certiorari to review the decision of the Court of Criminal Appeals was denied by the Supreme Court of Alabama without opinion, see *Ex Parte Summers*, 348 So. 2d 1136 (Ala. 1977).

JURISDICTION

Petitioner has applied for a Writ of Certiorari in this Court pursuant to 28 U.S.C. §1257(3). He asserts as grounds for his petition an allegation of a denial of due process because of certain statements made by the prosecuting attorney at his trial during final summation and because he was denied a continuance on the day of trial. His petition, however, as will be shown below, is untimely.

Petitioner's conviction and sentence of imprisonment was affirmed by the Alabama Court of Criminal Appeals on May 24, 1977 (A. 2). His application for rehearing in that Court was denied on June 28, 1977 (A. 2).

The Supreme Court of Alabama on August 26, 1977 denied Petitioner's request for a writ of certiorari from that Court to review the decision of the Court of Criminal Appeals (A. 3). Also on August 26, 1977, following the denial of certiorari by the Alabama Supreme Court, judgment was entered by the Alabama Court of Criminal Appeals (A. 3).

On September 7, 1977 Petitioner was granted, upon his request, a ninety-day stay of judgment dating from August 26, 1977 to permit him to file a Petition for Writ of Certiorari in the United States Supreme Court (A. 3). The certificate of judgment was likewise recalled by the Court of Criminal Appeals from the Circuit Court of Marshall County, Alabama on that date (A. 3).

On December 29, 1977, Petitioner presented to this Court his Petition for Writ of Certiorari. His petition is not timely. It was presented thirty-five days past the time allowed by Rule 22, Rules of the Supreme Court of the United States. His petition should have been filed on or before November 24, 1977 — ninety days from the entry of judgment by the Court of Criminal Appeals on August 26, 1977 — to fall within the time limit set by Rule 22. No reason for the delay was given in Petitioner's petition.

SUPREME COURT RULE AND STATUTES INVOLVED

Rule 22. Review on Ceritorari—Time Petitioning

1. A Petition for Writ of Certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the Clerk within ninety days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for writ of certiorari in such cases for a period not exceeding sixty days.

Section 12-21-260, *Code of Alabama* 1975
(Set out in Appendix)

Section 12-21-262, *Code of Alabama* 1975
(Set out in Appendix)

QUESTIONS PRESENTED

I.

Should this Court accept a Petition for Writ of Certiorari to review the judgment of a state court when it is presented to this Court 125 days after entry of judgment by the State

Court of last resort and no reason for the delay is given?

II.

Is it an abuse of discretion amounting to a denial of due process for a trial court to deny a request for a continuance in a state criminal proceeding where the defendant purports to wish to secure testimony by interrogatories of an indicted co-defendant but where there was no showing by the defendant that the co-defendant would even answer the interrogatories or that any material or favorable testimony would be obtained?

III.

Is reference to a defendant by a prosecuting attorney in closing argument in a state court criminal proceeding as a "safe specialist" proper argument when such a description of the defendant is warranted by the evidence?

IV.

Is reference by the prosecuting attorney in closing argument to a threat made by the defendant to a State's witness prior to the trial, when such threat is in evidence and when such reference is provoked by comments made by Petitioner's counsel during summation, proper argument?

STATEMENT OF THE CASE

Petitioner was indicted by the Marshall County, Alabama Grand Jury on September 17, 1976 for the crime of robbery (R. 183-84). On October 13, 1976 Petitioner was arraigned on the indictment and entered a plea of not guilty (R. 2-4).

Alabama law, through Section 12-21-260, *et seq.*, *Code of Alabama* 1975, provides a procedure whereby a defendant in a criminal case may, through the use of written interrogatories, secure trial testimony of witnesses who are physically unable to attend trial, reside more than 100 miles from the place of trial or are out of state. Section 12-21-262, *Code of Alabama* 1975, provides, however, that the procedure may not be utilized if the witness is within the jurisdiction of the court and able to attend court.

Pursuant to Section 12-21-260, Petitioner, on October 29, 1976, propounded interrogatories to two persons. The persons to whom the interrogatories were propounded were two indicted co-defendants, Russell Zinkhan and Donald Nissen (R. 197, 200). Nissen, who pleaded guilty and was sentenced to fifteen years imprisonment for his role in the crime, answered the interrogatories propounded by Petitioner (R. 204) and testified for the State as a witness at Petitioner's trial (R. 38-86, 119-125). The other co-defendant, Zinkhan, was present in the Marshall County Jail on November 11, 1976, the day of Petitioner's trial and was thus available to be called by Petitioner as a witness (R. 8). His presence and availability mooted, under Section 12-21-262, *Code of Alabama* 1975, any use of the testimony by written interrogatories procedure set out in Section 12-21-260.

One day prior to Petitioner's trial, on November 10, 1976, Petitioner propounded a third set of interrogatories to Jimmy Thomas, a third indicted co-defendant (R. 207). Thomas was, at the time, incarcerated in the State of Florida. The next day, on November 11, 1976, the day of trial, Petitioner moved for a continuance on the grounds that his interrogatories had not been answered (R. 210).

A hearing was held on the day of trial on Petitioner's

motion for continuance (R. 7-12). At the hearing on the motion for continuance, the trial judge pointed out to Petitioner that Zinkhan was present in the Marshall County Jail on that date and was thus available to Petitioner as a witness (R. 8). Petitioner's counsel stated that he would issue a subpoena for Zinkhan and talk to him (R. 8-9). Zinkhan, however, did not appear as a witness for Petitioner at the trial.

In regard to the interrogatories propounded the day before to the third co-defendant, Jimmy Thomas, Petitioner made no showing whatsoever at the hearing that Thomas would waive his privilege against self-incrimination and answer the interrogatories. The interrogatories asked substantive questions about Thomas' role in the crime charged (R. 207). Petitioner further made no showing whatsoever of what specific testimony would be elicited should the interrogatories be answered.

The trial judge denied the motion for continuance. Petitioner then proceeded to trial under the indictment in the Marshall County Circuit Court on that day, November 11, 1976 (R. 14). On November 12, 1976 Petitioner was found guilty by a jury and his punishment fixed by the jury at fifteen years imprisonment in the state penitentiary (R. 175). On the same day judgment was duly entered by the trial court and Petitioner was sentenced to fifteen years imprisonment by the trial judge (R. 226).

Petitioner has been at all stages in the proceedings, both at trial and on appeal, represented by retained counsel.

The evidence presented at the trial is set out in the opinion of the Alabama Court of Criminal Appeals at 348 So. 2d 1126-31. That portion of the evidence pertinent to

the issues raised in this petition is synopsized below.

The evidence at the trial showed Petitioner to be a member of an interstate group specializing in the gunpoint robbery of persons in their homes. Petitioner's role in the robbery ring was to "set up" the robberies, to provide the intelligence information concerning the residences to be robbed and their occupants and participate in the planning of the robberies. Petitioner also provided vehicles with false license plates to be used in the robberies and came along on the robbery trips in case his expertise as a safe-cracker were required.

The evidence showed that on the day in question, Petitioner and five of his associates left from Petitioner's used car lot in Clanton, Alabama for the express purpose of committing two robberies on that day — one in a small town south of Birmingham and the other in Boaz, Alabama at the home of the victims in this case, Mr. and Mrs. Joseph Cherry. Petitioner was along in case his services as a safecracker were required. Petitioner's intelligence information was to the effect that there was supposed to have been a safe in the Cherry residence. Petitioner had earlier attempted to burglarize the Cherry residence to "rob a safe" but had been prevented from doing so because of a burglar alarm system installed in the house. One of Petitioner's accomplices, who testified at the trial stated that "Paul [the Petitioner] came along in case we had to open a safe . . . " and that "he, uh came along and brought the safecracking tools. . . ."

The robbery was successful and some $5,559.00 was taken from Mr. and Mrs. Cherry at gunpoint by two of Petitioner's associates. Following the robbery, Petitioner and his accomplices traveled back to Petitioner's used car lot in Clanton and divided the money and other items taken in the robbery.

A State's witness testified at the trial of a threat that she had received from Petitioner shortly before the trial. Elaine McClellan, wife of one of Petitioner's confederates in the robbery, testified that Petitioner had called her at her home in Dothan, Alabama prior to the trial and had stated, "I don't hurt women or anything, but are you a State's witness?"

All the above evidence, contrary to Petitioner's assertions, was before the trial jury in the case and was not excluded, as Petitioner claims, by the trial court. Each instance where the evidence in question was received and placed before the jury is discussed in more detail below.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE WAS NOT TIMELY FILED.

On May 24, 1977, Petitioner's trial conviction was affirmed by the Court of Criminal Appeals of Alabama, see *Summers v. State*, 348 So. 2d 1126 (Ala. Crim. App. 1977). On June 28, 1977 his application for rehearing in that Court was overruled.

Petitioner thereafter filed a Petition for Certiorari in the Supreme Court of Alabama seeking review by that Court of the decision of the Court of Criminal Appeals upholding his conviction. On August 26, 1977, the Supreme Court of Alabama denied the Petition for Writ of Certiorari, see *Ex Parte Summers*, 348 So. 2d 1136 (Ala. 1977).

On the same day, August 26, 1977, the Court of Criminal Appeals of Alabama entered judgment in the case.

Thereafter, on September 7, 1977 Petitioner's trial counsel filed a motion for stay of judgment to allow him to file a Petition for Writ of Certiorari in the United States Supreme Court in his client's behalf. On that date, September 7, 1977 the Court of Criminal Appeals granted a ninety-day stay of execution of the judgment to run from August 26, 1977 and recalled its certificate of judgment so as to enable Petitioner to file a Petition for Writ of Certiorari in this Court.

United States Supreme Court Rule No. 22(1) requires that all petitions for writ of certiorari to review the judgment of a state court in criminal cases shall be filed in the Supreme Court of the United States within ninety days from entry of judgment by the state court of last resort. In this case the date of such entry of judgment was on August 26, 1977 when the Court of Criminal Appeals rendered final judgment in the case after Petitioner's Petition for Writ of Certiorari in the Alabama Supreme Court was denied.

The ninety-day period set forth in Rule 22 expired on November 24, 1977. On that day or before Petitioner had to have filed his Petition for Writ of Certiorari in this Court to be within the requirements of Rule 22. Instead, he presented his Petition for Writ of Certiorari to this Court on December 29, 1977, some thirty-five days after the expiration of the ninety-day limit set forth in Rule 22. No reason for the delay was stated in the petition.

Respondent is aware that this Court has held that the time requirements of Rule 22 are not jurisdictional and can be relaxed by this Court in the exercise of its discretion when the ends of justice so require, *Schacht v. United States*, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). However,

Petitioner has presented to this Court no excuse or justification whatsoever for the tardiness of the petition. Petitioner has been represented in all stages of this case by retained counsel and there has been no application to a Justice of the Court to extend the time period for sixty days pursuant to Rule 22(1). Since no reason is shown why this Court should not adhere to the time requirements of Rule 22(1), the petition should be denied.

II. THE TRIAL JUDGE COMMITTED NO ERROR IN REFUSING TO GRANT PETITIONER A CONTINUANCE ON THE DAY OF TRIAL TO OBTAIN THE TESTIMONY OF THE CO-DEFENDANT BY INTERROGATORIES FILED THE DAY BEFORE.

In the trial court below, Petitioner unsuccessfully attempted to use the Alabama statute providing for testimony by interrogatories of absent witnesses for the purpose of delaying his trial. The Alabama statute, Section 12-21-260, *Code of Alabama* 1975, provides that in criminal cases a defendant may secure trial testimony, through the use of written interrogatories, of any witness who is unable to attend court because of age, infirmity or sickness or resides out of state or more than 100 miles from the place of trial. Section 12-21-262, *Code of Alabama* 1975, provides, however, that the procedure cannot be utilized if the witness is present and available to the defendant at trial.

Two weeks prior to trial, utilizing Section 12-21-260, Petitioner filed interrogatories to two indicted co-defendants, Russell Zinkhan, (R. 200) and Donald Nissen, (R. 197). Nissen, who pleaded guilty and received a fifteen year sentence for his role in the robbery, answered the interrogatories

filed by Petitioner (R. 204). He also was present at Petitioner's trial and testified as a witness for the State (R. 38-86, 119-125).

The other co-defendant, Russell Zinkhan, was present in the Marshall County Jail at the Marshall County Courthouse on November 11, 1976, the day of Petitioner's trial, and was thus available to be called as a witness at the trial by Petitioner (R. 8).

One day prior to trial, on November 10, 1976, Petitioner filed a third set of interrogatories purportedly seeking trial testimony from a third indicted co-defendant, Jimmy Thomas (R. 207). Thomas was incarcerated at the time in the State of Florida. The next day, November 11, 1976, the day of trial, Petitioner moved for a continuance on the grounds that his interrogatories had not been answered (R. 210).

A hearing was held on Petitioner's motion for a continuance on the day of trial (R. 7-12). At the hearing, the trial judge pointed out to Petitioner that the co-defendant Zinkhan to whom Petitioner had propounded interrogatories was present on that date in the Marshall County Jail and thus available to Petitioner as a witness (R. 8). Petitioner's counsel stated that he would talk to Zinkhan and issue a subpoena for him (R. 8-9). The availability of Zinkhan as a witness to Petitioner thus mooted any use of the testimony by interrogatory procedure. Section 12-21-262, *Code of Alabama* 1975 precludes the use at trial of such interrogatories if the witness is present and available to the defendant.

In regard to the interrogatories which had been propounded the day before to the co-defendant Thomas, Petitioner made no showing whatsoever at the hearing that Thomas would waive his privilege against self-incrimination

and answer the interrogatories. Furthermore, Petitioner made no showing as to what specific testimony would be provided by the answers to Thomas' interrogatories should they be answered (R. 7-12).

In the face of these facts, it is manifestly clear that the trial judge committed no error whatsoever in denying Petitioner's motion for continuance and that the Alabama Court of Criminal Appeals was entirely correct in affirming the trial judge's action in denying the motion for a continuance. It is clear that the granting or denial of a continuance is a matter withi the sound discretion of the trial judge, *Ungar v. Sarafite*, 376 U.S. 575, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964); *Avery v. Alabama*, 308 U.S. 444, 84 L. Ed. 377, 60 S. Ct. 321 (1940); *Franklin v. South Carolina*, 218 U.S. 161, 54 L. Ed. 980, 30 S. Ct. 640 (1910). Under the facts and circumstances in this case no abuse of discretion was committed by the trial judge. The law is well settled that before any question of error can be presented concerning a refusal of a trial court to grant a continuance to secure the testimony of absent witnesses, there must have been a showing at the time of what the absent witness would testify to, that the testimony in question could in fact be obtained and that the evidence sought would be substantially favorable to the accused, see e.g., *United States v. Harris*, 436 F. 2d. 775 (9th Cir. 1970); *United States v. Roca-Alverez*, 451 F. 2d 843 (5th Cir. 1971) reh. granted on other grounds 474 F. 2d 1274 (1972); *Blackwell v. United States*, 405 F. 2d 625 (5th Cir. 1969), cert. den. 395 U.S. 962 (1969). See also *Dearinger v. United States*, 468 F. 2d 1032 (9th Cir. 1972); *Leino v. United States*, 338 F. 2d 154 (10th Cir. 1964); *Sanchez v. United States*, 311 F. 2d 327 (9th Cir. 1962) cert. den. 373 U.S. 949 (1963); *Suit v. Ellis*, 282 F. 2d 145 (5th Cir. 1960). The Supreme Court of the United States in *Ungar v. Sarafite*, 376 U.S. 575,

11 L. Ed. 2d 921, 84 S. Ct. 841 (1964) has clearly recognized the rule that before a due process claim can be made out in cases involving a denial of a motion for a continuance, the accused must have made a good and sufficient showing *at the time* of the underlying reasons behind the necessity for a continuance:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (citations omitted). 376 U.S. at 589, 11 L. Ed. 2d at 931.

Here, the facts manifestly show that no error is present. Petitioner propounded interrogatories seeking trial testimony to three persons. One of the three answered the interrogatories and testified at the trial. The second was available at the trial to be called by a witness by Petitioner. Interrogatories to the third person were not filed until the day prior to trial. These interrogatories were sent to a person under indictment for the same crime as Petitioner. Petitioner made no showing either that his co-defendant would answer the interrogatories or of what specific testimony the co-defendant would provide should he answer the interrogatories. Under this set of circumstances, Petitioner may in nowise claim a denial of due process.

III. THE COURT OF CRIMINAL APPEALS OF ALABAMA WAS CORRECT IN HOLDING NO ERROR WAS PRESENT IN A PROSECUTOR'S REFERENCE TO PETITIONER AS A "SAFE SPECIALIST" IN CLOSING SUMMA-

TION AS SUCH REFERENCE WAS PROPERLY BASED UPON COMPETENT EVIDENCE BEFORE THE JURY IN THE TRIAL BELOW.

Petitioner complains that the Court of Criminal Appeals of Alabama denied him due process when it found no error in a reference by the prosecuting attorney to Petitioner as a "safe specialist" during the prosecutor's closing argument at the trial below. Specifically, Petitioner complains that the Court of Criminal Appeals of Alabama was in error in so holding because the remarks by the prosecuting attorney were not based upon evidence before the jury. He claims that the Court of Appeals relied upon evidence which had been excluded from the jury's consideration in affirming the propriety of the prosecutor's remarks.

Yet, when the trial record below is examined, it is quite evident that such is not the case at all. The remarks of the prosecuting attorney were fully based upon evidence which was squarely before the jury for its consideration.

For example, during the testimony of Donald Nissen, an accomplice of Petitioner who testified against Petitioner at the trial, there was testimony which clearly pointed to Petitioner's specialty as a safecracker. Nissen testified that prior to the robbery in question, Petitioner had related to his group of accomplices a prior occasion wherein he and some other persons had "cased" the residence of the victims in the case. Nissen testified as to what Petitioner had told them:

> It was discussed about robbing the Cherry family. Paul Summers told us that, uh, he had, uh, been up

> there and looked at it with the intentions of burglarizing the house, *to rob a safe*, with someone else. I'm not sure who the other person was. Due to the fact that there was an alarm on the house, uh, a burglar alarm, they could not break in without detection, so that he had asked us to go up there and look at it with him with the thought in mind of robbing the family at gunpoint because they couldn't get in to pull a burglary. (R. 41) (Emphasis supplied)

Later on in his testimony, Nissen testified that:

Q. Don, what did Mr. Summers, the defendant, or anybody in his presence say about his coming on that trip that day?

A. *Paul came along in case we had to open a safe, to open the safe for us at the first place that we robbed that day.*

Q. All right. Where was that?

MR. WILKINSON: We object, Your Honor.

THE COURT: Overruled.

MR. WILKERSON: We except.

Mr. Yung (Continued):

Q. Where was that?

A. That was, uh, a home near Hoover of a, uh, policeman. I don't remember his name offhand,

and we did rob the place but *there was no safe inside the house.*

Q. All right. And what, if anything, did he say he would do had there been a safe there?

MR. WILKERSON: We object. T his is something a hundred miles away and totally unrelated.

MR. YUNG: Your Honor, it's all part of the same criminal adventure.

MR. WILKERSON: We object.

THE COURT: Overruled. Go ahead.

MR. WILKERSON: We except.

A. *He, uh, came along and brought the safecracking tools,* uh, and was ready to open the safe at that house when we were in there.

MR. WILKERSON: I object and move to exclude that.

Mr. Yung (Continued):

A. Was there a safe in that house?

THE COURT: Just one second. Let me rule on this.

MR. YUNG: Excuse me.

THE COURT: The words of the witness that he was ready to do certain things are ex-

cluded as being a conclusion of the witness; do not consider them in reaching your decision in this case.

Mr. Yung (Continued):

Q. Was there a safe in the first house?

MR. WILKERSON: We object.

THE COURT: I believe he has already answered that question. Sustained.

MR. YUNG: I believe that's all.
(R. 84-85) (Emphasis supplied)

Therefore evidence was clearly before the jury that (1) Petitioner had earlier "cased" the scene of the crime with the intention of burglarizing it to "rob a safe"; (2) Petitioner came along on the journey to "open the safe" in the first of two robberies committed that day and (3) Petitioner had "brought the safe-cracking tools" with him on the trip. The only evidence that was excluded by the trial court during this portion of the testimony was a conclusion on the part of the witness Nissen as to what Petitioner was "ready to do" at the scene of one of the robberies.

Therefore, the reference by the prosecuting attorney to Petitioner as a "safe specialist" was clearly supported by the evidence adduced at the trial. Under the evidence in the case, the statement succinctly and accurately described one of Petitioner's roles in the robbery for which he was convicted.

Further, in addition to the fact that the reference was completely supported by the evidence, the Court of Criminal

Appeals of Alabama was entirely correct in holding that the reference did not constitute error. A review of the applicable law shows the reference to be well within the scope of permissible comment that may be utilized by a state court prosecuting attorney in closing arguments in state criminal trials.

There is a distinction between the types of review that will be exercised by this Court in examining statements made in final summation in state court proceedings and the review which will be exercised in regard to federal court proceedings. In *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) this Court made it clear that in cases involving the propriety and prejudicial effect of a prosecutor's courtroom statements, the standard of review that will be employed in examining state proceedings is the narrow ground of determining whether due process has been violated. This was contrasted with the broader and stricter review applicable to federal criminal prosecutions under the supervisory power exercised by federal appellate courts over federal trial courts. In *Donnelly*, this Court stated:

> The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 US 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941). . . . 416 U.S. at 642, 40 L. Ed. 2d at 436.

However, in this case, regardless of what standard of review is employed, no error is shown. The argument by the prosecuting attorney here, which was completely supported by the record, not only does not constitute error of either kind, but constitutes completely proper argument by an advocate for the Government in a criminal trial.

In reviewing the propriety of the closing arguments made by a prosecutor in a criminal case, federal appellate courts recognize the same rule cited by the Alabama Court of Criminal Appeals in its opinion below, i.e., that prosecuting attorneys are allowed wide latitude in drawing their deductions from the evidence and that comments, even though hard-hitting, which may arise from reasonable inferences from the evidence are permissible, see e.g., *United States v. Nolan*, 551 F. 2d 266 (10th Cir. 1977); *United States v. Deloach*, 504 F. 2d 185, 164 U.S. App. D.C. 116 (1974); *United States v. Gorostiza*, 468 F. 2d 915 (9th Cir. 1972); *United States v. Lawson*, 483 F. 2d 535 (8th Cir. 1973) cert. den. 414 U.S. 1133 (1974). In *United States v. Cook*, 432 F. 2d 1093 (7th Cir. 1970) cert. den. 401 U.S. 996 (1971) the Seventh Circuit stated the rule to be:

> The district attorney is quite as free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the government produces and which is favorable to him. 432 F. 2d at 1106-07.

An examination of other cases which have involved characterization of the defendant by a prosecuting attorney

show that the reference by the prosecutor in this case to the defendant as a "safe specialist" in the context of this case, clearly does not constitute error. Such a statement is well within not only the bounds established by the narrow due process standard employed in reviewing state court proceedings, but also well within the broader and stricter standards used in reviewing federal criminal trial proceedings.

Such a statement is clearly not a denial of due process. For example, in *Downie v. Burke*, 408 F. 2d 343 (7th Cir. 1969) cert. den. 395 U.S. 940 (1969), a state prisoner alleged that the prosecuting attorney referred to him in his final summation to the jury as a "Big Ape" and a "Gorilla." It was claimed that such argument was so improper as to constitute both a denial of due process and a denial of the right to trial by an impartial jury. The Seventh Circuit disagreed, holding that the claimed references by the prosecutor did not constitute any such error as would "attain constitutional proportions," 408 F. 2d at 344. Likewise, in *Kelley v. Rose*, 346 F. Supp. 83 (E.D. Tenn. 1972) a state prisoner contended in a habeas corpus petition that in a rape prosecution, the prosecuting attorney in closing argument, referred in part to him stated: "These things, these animals, these beasts, brutally attacked this little twelve-year old girl." It was claimed that this asserted argument was improper and its error reached constitutional proportions resulting in a denial of due process. The Court, assuming the closing argument to be as asserted by the habeas corpus petitioner, held that such argument, even though it might have been improper, "would not appear to rise to the level of the denial of due process," 346 F. Supp. at 89.

The prosecuting attorney's reference to Petitioner as a "safe specialist" in this case, as such a reference was completely supported by the evidence, is also well within the stricter standard employed by federal appellate courts in judging the propriety of closing arguments made in federal criminal trial proceedings. For example, in *United States v. Cook*, supra, the prosecutor in closing summation referred to Cook as a "sub-human man" with a "rancid, rotten mind," and a "true monster." The evidence showed in the case that the defendant had engaged in a plot to kill his wife by having a bomb explode on an airplane in which she was traveling, a crime which, if successful, would have resulted in the deaths of some eighty other persons. The Seventh Circuit rejected the defendant's contentions that the above argument constituted reversible error stating that "There would seem to be evidence supporting the comments of the prosecuting attorney," 432 F. 2d at 1107. Further, in *United States v. Taxe*, 540 F. 2d 961 (9th Cir. 1976) cert. den. 97 S. Ct. 737 (1977), the prosecutor referred to the defendant in closing argument as a "fraud", "scavenger", "parasite", and "professional con-man", in a prosecution for record piracy. The Ninth Circuit held that the characterizations in question were either supported by the evidence or not enough of an exaggeration to have deprived the defendant of a fair trial, 540 F. 2d at 968.

In *United States v. James*, 466 F. 2d 475, 151 U.S. App. D.C. 304 (1972) in a federal criminal trial in the District of Columbia, the prosecuting attorney used the term "monster." The Court of Appeals for the D. C. Circuit held that, in the context in which the comment was made, that there was no impropriety. In *United States v. Guidarelli*, 318 F. 2d 523 (2nd Cir. 1963), cert. den. 375 U.S. 828, in a prosecution for filing false and fraudulent income tax returns, the prosecutor referred to the defendant as a "leech" in final summation.

The Second Circuit held that this reference by the prosecutor to the defendant was not sufficient to require a reversal of the case. Other circuits have allowed equally wide latitude in determining the propriety of the statements made by a federal prosecuting attorney in closing argument in federal criminal proceedings. Among the sobriquets which have been upheld as proper or not sufficiently prejudicial to require reversal have been "panderer," *Patterson v. United States*, 361 F. 2d 632 (8th Cir. 1966); "human vulture," *Kowalchuk v. United States*, 176 F. 2d 873 (6th Cir. 1949); "pimp," *United States v. Cohen*, 177 F. 2d 523 (2nd Cir. 1949), cert. den. 339 U.S. 914 (1950); "king of bootleggers," *Lau v. United States*, 13 F. 2d 975 (8th Cir. 1926), cert. den. 273 U.S. 739 (1927); "burglar," *United States v. Stead*, 422 F. 2d 183 (8th Cir. 1970), cert. den. 397 U.S. 1080 (1970); "trafficker in human misery," *United States v. Markham*, 191 F. 2d 936 (7th Cir. 1951); "crook," *United States v. Hoffman*, 415 F. 2d 14 (7th Cir. 1969), cert. den 396 U.S. 958 (1969); "natural son of an unnatural father," *United States v. Walker*, 190 F. 2d 481 (2nd Cir. 1951), cert. den. 342 U.S. 868 (1951); "wolf from Wall Street," *United States v. Goodman*, 110 F. 2d 390 (7th Cir. 1940); "living fraud," *Herman v. United States*, 220 F. 2d 219 (4th Cir. 1955), cert. den. 350 U.S. 971 (1956); and "partner in crime," *Mellor v. United States*, 160 F. 2d 757 (8th Cir. 1947), cert den. 331 U.S. 848 (1947).

Petitioner's citation of *Hall v. United States*, 419 F. 2d 582 (5th Cir. 1969) is completely inapposite to the case at bar. In *Hall*, the Fifth Circuit specifically pointed out that the reference to the defendant as a "hoodlum" was *unsupported by the evidence*, 419 F. 2d at 587. Here, as stated at length above, the reference by the prosecuting attorney to the Petitioner as a "safe specialist" was completely

supported by the evidence and accurately and succinctly described Petitioner's role in the robbery for which he was convicted.

IV THE COURT OF CRIMINAL APPEALS WAS CORRECT IN HOLDING THAT NO ERROR WAS PRESENTED BY THE PROSECUTING ATTORNEY'S REFERENCE TO A THREAT MADE BY PETITIONER TO A STATE'S WITNESS PRIOR TO THE TRIAL AS SUCH REFERENCE WAS SUPPORTED BY COMPETENT EVIDENCE WHICH WAS BEFORE THE JURY IN THE TRIAL BELOW.

Petitioner further asserts that the Court of Criminal Appeals denied him due process when it held that a reference made by the prosecuting attorney in closing summation to a threat made by Petitioner to a State's witness was proper. Petitioner again asserts that the Court of Criminal Appeals relied upon evidence which had been excluded by the trial court in upholding the prosecutor's remarks.

Yet, again, an examination of the record shows that such is not the case. The threat to which the prosecuting attorney made reference in his closing summation was clearly and properly before the jury.

During the testimony of Elaine Campbell McClellan, the wife of one of Petitioner's confederates in the robbery, the threat made by defendant was squarely placed in evidence before the jury. Mrs. McClellan testified to the following:

> Q. Elaine, have you had occasion to speak with the defendant in the last few weeks?

A. Yes, I have.

Q. Where were you at the time?

A. At home.

Q. All right. Did you speak with the defendant in person or on the telephone?

A. Over the phone again.

Q. Did you call him or did he call you?

A. He called me.

Q. Would you tell the Jury what, if anything, he said at that time?

A. First of all, he said would I answer a question truthfully for him.

Q. What did you tell him?

A. I said yes I would.

Q. What did he say in response to that, if anything?

A. He wanted to know if I was going to be a State's witness.

Q. What did you tell him?

A. I said, "Lord, no, whatever gave you that idea?"

Q. Did he say anything else?

Q. Yes. Before he asked me the question . . .

THE COURT: Speak a little louder, please.

Mr. Royer (Continued):

Q. Did he say anything else at that time when he asked you if you were going to be a witness?

MR. WILKERSON: We object to this whole line of inquiry.

THE COURT: Overruled at this point.

Mr. Royer (Continued):

Q. You may answer.

A. Yes. Before he asked me the question if I was going to be a State's witness, he said, "I don't hurt women or anything, but are you a State's witness?"

Q. The defendant asked you that?

A. Yes, he did.

Q. On the telephone?

A. Right.

MR. ROYER: Your witness.

(R. 96-97).

The implication as recognized by the Alabama Court of Criminal Appeals, was clear — it was a "warning to Mrs. McClellan that she would be in danger if she showed up at

appellant's trial and testified against him," 348 So. 2d at 1135.

The reference made in final summation by the prosecutor to this threat by Petitioner to Mrs. McClellan had been provoked and invited by similar remarks made by Petitioner's counsel during his portion of the closing argument. Petitioner's counsel had complained that Petitioner did not know ahead of time who the witnesses were who would testify against him at the trial. Petitioner's counsel had stated:

> You look at the indictment and see who is listed as witnesses on that indictment. Mr. and Mrs. Joe Cherry. The Cherrys. That's all. That's all Paul Summers knew, that he was charged with robbing the Cherrys, not on a specific date, not until he comes into this courthouse does he know. (R. 142-43).

It was in response to the above statements by Petitioner's counsel that the prosecuting attorney made the statements regarding the threat by Petitioner to Mrs. McClellan. That portion of the argument of the prosecuting attorney which contains the reference is as follows:

> He [Petitioner's counsel] complained that Paul Summers didn't know who the witnesses were going to be from the indictment because the indictment only listed the Cherrys. Lady and Gentlemen, if he had known who the witnesses were going to be, there is some evidence that would suggest that we would not have had any witnesses. Elaine McClellan testified that . . .
>
> MR. WILKERSON: Your Honor, we object, if it please the Court.

> THE COURT: Let me think just a second. I believe he can answer that. Overruled [sic] your objection.
>
> MR. WILKERSON: He's arguing as to suggest some alleged threat to kill a witness, I think.
>
> MR. YUNG: Judge, I haven't said anything about any . . .
>
> THE COURT: I don't know what he is going to say.
>
> MR. YUNG: Elaine, you will recall, said that just a few weeks ago she got a threatening phone call of recent date from this man who said, "Elaine, I don't hurt women or anything, but" or words to that effect, "You wouldn't be a State's witness in the case that's coming up against me, would you?" and she said, "No, why would you think that, Paul?" and, well, apparently he believed her. She did show up today.
>
> MR. WILKERSON: Judge, we object to that. We ask the Court to instruct the jury to disregard that. It's prejudicial and inflammatory.
>
> THE COURT: Disregard the last statement of counsel; don't consider it in reaching your decision in this case. (R. 153-54).

Under the facts as shown by the record in this case, the Alabama Court of Criminal Appeals was quite correct in holding that there was no error in the prosecutor's statements. Reference to the threat made by Petitioner to the State's witness, Elaine McClellan, was clearly supported by

the record in the case. As such, this conduct by Petitioner in evidence, was clearly a matter of proper comment by the prosecutor. The argument by the prosecutor was merely in response to and answered the statement made by Petitioner's attorney during his portion of summation. Finally, when the prosecuting attorney made specific reference to the statement in question, the trial judge, upon Petitioner's request, instructed the jury to disregard the statement made by the prosecutor.

It is axiomatic that a prosecutor, in closing argument, may make fair comment upon and respond to matters raised by defense counsel during his portion of the final summation, see, e.g., *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir. 1974) cert. den. *Kerner v. United States*, 417 U.S. 976 (1974); *United States v. Martin*, 533 F. 2d 268 (5th Cir. 1976); *United States v. Marquez*, 462 F. 2d 893 (2nd Cir. 1972); *United States v. Passero*, 290 F. 2d 238 (2nd Cir. 1961) cert. den. 368 U.S. 819 (1961); *United States v. Harris*, 494 F. 2d 1273 (10th Cir. 1974) cert. den. 419 U.S. 993 (1974); *United States v. Librach*, 536 F. 2d 1228 (8th Cir. 1976). It is said that a prosecuting attorney has considerable latitude in replying to his opponent's arguments, see *United States v. Nolan*, 551 F. 2d 266 (10th Cir. 1977); *United States v. Nowak*, 448 F. 2d 134 (7th Cir. 1971) cert. den. 404 U.S. 1039 (1972); *United States v. Lawler*, 413 F. 2d 622 (7th Cir. 1969), cert. den. 396 U.S. 1046 (1970). In this context, the remarks of the prosecuting attorney in reply to Petitioner's counsel's arguments were entirely proper. Petitioner's counsel complained that his client was not informed prior to the trial who the witnesses were who were going to testify against him. The prosecuting attorney, replying in kind, used the defendant's own conduct, statements and actions which were in evidence to explain the reason why.

Furthermore, when the prosecutor quoted the specific testimony involving the threat made by Petitioner in closing argument, upon Petitioner's objection, the trial court instructed the jury to disregard the statement in reaching their verdict in the case. Clearly then, if any error whatsoever was present in the prosecutor's remarks, the action of the trial judge in instructing the jury to disregard the statement cured the error.

CONCLUSION

In short, none of the rulings here complained of constitute error, much less error of constitutional proportions. For Petitioner to be successful on this writ he must establish that the rulings below were error of sufficient magnitude to result in a denial of due process. Under the evidence in the record of this case he can make no such showing and Respondent submits the writ is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

BY—

GEORGE W. ROYER, JR.
ASSISTANT ATTORNEY GENERAL

250 Adminisrative Building
Montgomery, Alabama 36130

AFFIDAVIT OF SERVICE

I, George W. Royer, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in this case were mailed on this date to the Honorable Fred Blanton, attorney for Petitioner, at his address at 3716 5th Avenue South, Birmingham, Alabama 35222, first class, postage prepaid.

Dated this the 25 day of January, 1978.

Geo. W. Royer

GEORGE W. ROYER, JR.
ASSISTANT ATTORNEY GENERAL

250 Administrative Building
Montgomery, Alabama 36130

APPENDIX

Section 12-21-260, **Code of Alabama, 1975**

(a) The defendant may take the deposition of any witness who from age, infirmity or sickness, is unable to attend court or who resides out of the state or more than 100 miles from the place of trial, computing by the route usually traveled, or who is absent from the state or where the defense, or a material part thereof, depends exclusively on the testimony of the witness.

(b) When the defendant desires to take the deposition of any witness under the provisions of subsection (a) of this section, he must make affidavit before some officer authorized to administer oaths, setting forth some one or more of the above causes for taking the deposition and that the testimony of the witness is material and must file with the clerk interrogatories to be propounded to the witness, a copy of which interrogatories must be served on the prosecutor or on the district attorney, if either of them is in the county. Such prosecutor or district attorney may, within 10 days thereafter, file cross-interrogatories, to which the defendant may, within a like period of 10 days, file rebutting interrogatories, at the expiration of which time or, if no cross-interrogatories are filed, at the expiration of 10 days from the filing of the interrogatories in chief, the clerk must issue a commission, accompanied with a copy of all the interrogatories filed, and the deposition must be taken at such time and place as the commissioner may appoint. If neither the district attorney nor prosecutor is in the county, service of the interrogatories may be had by filing the interrogatories in the office of the clerk for 10 days.

Section 12-21-262, **Code of Alabama, 1975**

Deposition taken under the provisions of sections 12-21-260 and 12-21-261 are governed by the same rules which are

applicable to depositions taken in civil cases, and no such deposition can be read in evidence on the trial if it appears that the witness is alive and able to attend court and within its jurisdiction.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

8 Div. 943

Oliver Paul Summers, alias

v.

State

Appeal from Marshall Circuit Court

Number 76-250A

November 12, 1976 Notice of Appeal Filed.

January 12, 1977 Record Filed.

January 12, 1977 Notice of Filing Record to all Parties.

April 5, 1977 Come the parties by attorneys and argue and submit this cause for decision.

May 24, 1977 Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

June 7, 1977 Comes the appellant in the above styled cause and moves the Court to grant a rehearing.

June 28, 1977 It is ordered that the application for rehearing is overruled.

July 12, 1977 Petition for Writ of Certiorari filed in the Alabama Supreme Court.

August 26, 1977 Petition for Writ of Certiorari denied by the Alabama Supreme Court.

August 26, 1977 Certificate of Judgment of Court of Criminal Appeals issued.

September 7, 1977 Motion for Stay of Judgment filed by appellant.

September 7, 1977 Motion granted and stay of ninety days from August 26, 1977 allowed for filing petition for Writ of Certiorari in the Unied States Supreme Court.

September 7, 1977 Certificate of Judgment of Court of Criminal Appeals recalled from Circuit Court of Marshall County.

STATE OF ALABAMA)
)
MONTGOMERY County)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing page contains a full, true and correct copy of the docket entries, orders, and judgment in the appeal of Oliver Paul Summers, alias v. State of Alabama, 8 Div. 943, Marshall Circuit Court Number 76-250A, as the same remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk
of the Court of Criminal Appeals,
this 8th day of December, 1977.

MOLLIE JORDAN
Clerk, Court of Criminal Appeals of
Alabama

Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

* * * * * * * * * * *

NO. 77-975

* * * * * * * * * * *

OLIVER PAUL SUMMERS,
Petitioner

vs.

STATE OF ALABAMA,
Respondent

* * * * * * * * * * *

REPLY
to
BRIEF IN OPPOSITION OF
STATE OF ALABAMA

* * * * * * * * * * *

FRED BLANTON, JR., Esq.
Law Offices
3716- 5th Avenue, South
Birmingham, AL 35222

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

* * * * * * * * * * *

NO. 77-975

* * * * * * * * * * *

OLIVER PAUL SUMMERS,
Petitioner
versus
STATE OF ALABAMA,
Respondent

* * * * * * * * * * *

REPLY
to
BRIEF IN OPPOSITION OF STATE OF ALABAMA

* * * * * * * * * * *

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 24(4), Rules of the Supreme Court of the United States, petitioner, OLIVER PAUL SUMMERS, would reply to matters which have been raised in the Brief in Opposition filed herein by the respondent State of Alabama:

I.

This part of the Brief in Opposition raises the question of the timeliness of the docketing of the present petition for writ of certiorari. The Attorney General of Alabama states that he is not aware of any reason for this untimeliness.

However, on December 27, 1977, there was mailed to the Attorney General of Alabama

a copy of the following(omitting formal parts):

MOTION TO ALLOW OUT-OF-TIME FILING
OF
PETITION FOR WRIT OF CERTIORARI
* * * * * * * * *

TO THE HONORABLE LEWIS F. POWELL, JR., As Circuit Justice for the Fifth Judicial Circuit of the United States:

OLIVER PAUL SUMMERS, movant here, moves for an ORDER which will permit him to file his petition for writ of certiorari to the Court of Criminal Appeals of the State of Alabama, and shows the following facts in support of this motion:

(1). On August 26, 1977, the Supreme Court of Alabama denied his petition for writ of certiorari to the Court of Criminal Appeals of Alabama, which had affirmed his conviction for the crime of robbery on May 24, 1977, and had denied his application for rehearing on June 28, 1977.

(2). Immediately upon the denial of certiorari by the Supreme Court of Alabama of his petition for writ of certiorari, SUMMERS engaged the services of his trial counsel, J. LOUIS WILKINSON, Esq., attorney of Birmingham, Alabama, to prepare, file, and docket a petition for a writ of certiorari to the Court of Criminal Appeals of the State of Alabama in the Supreme Court of the United States.

(3). Despite repeated assurance from Mr. Wilkinson and his associate, CHARLES M. PURVIS, Esq., that his petition

for a writ of certiorari had been presented to the Supreme Court of the United States, or had been filed or docketed therein, SUMMERS learned on December 23, 1977, that, in fact, no such petition for a writ of certiorari had been presented, filed, or docketed. He was also aware that this petition had to be docketed or was due to be filed on or before the expiration of 90 days from August 26, 1977, unless an extension of time had been granted pursuant to Rule 22, Rules of the Supreme Court of the United States. Apparently, no such motion for extension of time had been presented as permitted by the rule. The present motion is presented within the 60 days that an extension of time would have allowed for filing and docketing a petition for writ of certiorari.

(4). SUMMERS attaches hereto an affidavit setting forth the facts in detail as outlined above of and concerning his efforts to have a properly filed petition for writ of certiorari docketed timely in this Court.

(5). SUMMERS also attaches to this motion the petition for writ of certiorari which would be filed should this present motion be granted, and states that an examination of such proposed petition would indicate that he desires to raise substantial questions under the Constitution of the United States concerning his conviction and its affirmance in the courts of the State of Alabama.

(6). SUMMERS states that he has been diligent in connection with this petition for writ of certiorari, and that he has acted promptly after learning of the true state of facts.

* * *

A F F I D A V I T

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, FRED BLANTON, a notary public for the State of Alabama at Large, personally appeared OLIVER PAUL SUMMERS, who is known to me and who, being first duly sworn, deposes and says as follows:

My name is OLIVER PAUL SUMMERS, and I am over the age of twenty-one years, and a resident citizen of Clanton, Chilton County, State of Alabama.

I am informed I am making this affidavit in connection with my motion to permit me to file in the Supreme Court of the United States a petition for a writ of certiorari directed to the Court of Criminal Appeals of Alabama, which affirmed my conviction for the crime of robbery on May 24, 1977.

After my conviction in the Circuit Court of Marshall County, Alabama, I retained my trial counsel for appellate work. These attorneys were J. LOUIS WILKINSON and CHARLES M. PURVIS of the Birmingham, Alabama Bar.

Also, after the denial of certiorari by the Supreme Court of Alabama on August 26, 1977, I retained Messrs. Wilkinson and Purvis to prepare and

file in the Supreme Court of the United States a petition for a writ of certiorari to the Court of Criminal Appeals of Alabama. The charge for this was $1000.00, including the necessary duplication. I have paid the $1000.00, and to the best of my recollection this was paid early in June of 1977.

After August 26, 1977, I called and talked with Mr. Wilkinson about this several times, since I was aware of a time limit, and that the Court of Criminal Appeals had delayed a mandate in the case for 90 days to permit me to file the petition for writ of certiorari in the Supreme Court of the United States. I was assured on each occasion that the petition would be properly filed and on time.

In the early part of December of this year, Mr. Wilkinson gave me a copy of a booklet which he said was the petition for certiorari which was being filed in the Supreme Court of the United States.

I was in the office of an attorney in Clanton, Alabama, when he called Mr. Purvis about the filing of the petition. This was late in December of 1977. Mr. Purvis stated the petition had been filed. This was on December 23, 1977, after I had been informed that the Clerk of the Supreme Court of the United States had said that there was no petition filed for Oliver Paul Summers against the State of Alabama.

I immediately took steps to do what I could about this, and have filed the

assistance of counsel who is a member of the Bar of this Court.

Under these circumstances, over which I have had no control, I request the Court to permit me to file my petition for writ of certiorari, which I know is out-of-time.

s/ Oliver Paul Summers
OLIVER PAUL SUMMERS

Sworn to and subscribed before me this 27th day of December, 1977.

s/ Fred Blanton
Notary Public, Alabama, State at Large, My Commission Expires January 7, 1978

(SEAL)

While the foregoing motion was not presented to Mr. Justice Powell, as counsel was informed by telephone on December 29, 1977, the Attorney General was mailed a copy of the motion and all accompanying papers.

Further, a manuscript copy of an alleged petition for writ of certiorari was filed in the Court of Criminal Appeals of Alabama on November 28, 1977, wherein it was certified, by counsel not associated in any way with present counsel, that a copy had been served on the Attorney General of Alabama. And the booklet referred to above by SUMMERS was allegedly served on the Attorney General of Alabama by the same counsel. Under these circumstances, it would appear that the Attorney General of Alabama was on notice that there was some difficulty with the docketing of the petition for writ of certiorari in this case, not due to any

any fault of petitioner.

Petitioner SUMMERS submits that given the foregoing facts and circumstances that the State of Alabama has been less than candid in arguing for a denial of a writ on the ground of untimeliness.

Lastly, while petitioner SUMMERS is cognizant of the restrictions imposed upon him in replying to the Brief in Opposition, he would point out that the State of Alabama has admitted that he was put to trial within 30 days of arraignment, and practically within 30 days after indictment. This overly speedy trial which prevented the use of interrogatories is a key point in the questions presented to this Court in the petition for a writ of certiorari.

Also, the bases for other questions is not eroded by the testimony produced at pp.15 thru 17 of the Brief in Opposition. At the bottom of p.16 and the top of p. 17, it appears clearly that the trial court excluded from the consideration of the jury remarks about petitioner SUMMERS and safes.

Too, the testimony at pp.24 and 25 of the Brief in Opposition was merely admitted conditionally when the trial judge stated: "Overruled at this point." The trial judge obviously ruled this testimony out when the objection was sustained to argument based upon it. See p. 27 of the Brief in Opposition.

CONCLUSION

Petitioner SUMMERS submits that the

petition for a writ of certiorari heretofore docketed in this Court should be considered by the Court on its merits.

Most respetcfully,

FRED BLANTON, JR., Esq.
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FEBRUARY, 1978